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IN THE

Supreme Court of the United States

October Term, 1942.
No. 332

LEROY J. LEISHMAN,

Petitioner,

vs.

ASSOCIATED WHOLESALE ELECTRIC COMPANY, a corporation,

Respondent.

BRIEF OF PETITIONER IN THE NATURE OF A SUPPLEMENT TO THE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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I.

Introduction.

The brief of petitioner in support of his petition is herewith adopted and made a part of this brief. The statement of the matter involved is set forth in the petition itself, on pages 1, 2, 3, and 4 thereof.

The question presented may be succinctly set forth:

Under Rule 52 (b) of the Rules of Civil Procedure, petitioner filed a motion in the District Court, after a final judgment was entered therein. This motion included, among other things, a request for additional findings, which would have required corresponding amendment of

the judgment. Petitioner urges that such a motion tolls the period during which an appeal may be taken from the judgment.

Respondent's contention, as expressed in its brief opposing the grant of the writ of certiorari, seems to be based on the notion that only by a timely motion under Rule 59, can the appeal period be tolled; and respondent further contends that "the motion was a motion under Rule 52 (b) and hence did not serve to extend the time" (page 4, respondent's answering brief opposing grant of writ of certiorari).

Thus the issue between the parties is simple and clear cut.

II.

Argument.

Petitioner's motion under Rule 52 (b) concluded with a request for supplemental findings upon issues that the District Court found unnecessary to consider. Thus [R. Vol. I, p. 46] the motion states:

> "10. In addition, the following supplemental findings should be made:
>
> "(24) The accused device exemplified by Plaintiff's Exhibit 10 is an infringement of the reissued patent No. 20,827.
>
> "(25) The reissue Letters Patent No. 20,827 is for the same invention as original Letters Patent No. 2,108,538 and is therefore a valid reissue.
>
> "(26) The disclaimers filed in connection with claims 8, 9, and 10 are valid.
>
> "(27) The reissue Patent No. 20,827 is a narrowing one and defendant has no intervening rights."

This Honorable Court may be reminded that the District Court had ruled specifically on but one point: to the effect that certain claims of the patent in suit were invalid for lack of invention.

These requests for additional findings are undisputedly permitted by Rule 52 (b); and *that rule states that the judgment may be amended accordingly.* But, as pointed out in petitioner's brief in support of the petition for writ of certiorari, the Court of Appeals in this case nevertheless held [R. Vol. IV, p. 687] that petitioner's motion was not a motion to amend the judgment.

Upon this basis, and this alone, the Circuit Court of Appeals dismissed the appeal. It is clear beyond question that the decision finding that the motion was not a motion to amend the judgment, is erroneous. Nor does respondent seriously contest this point.

Petitioner further referred to *Zimmern et al. v. United States,* 298 U. S. 167; 56 Supreme Court Reporter, 706, as authority for the general statement that while a judgment is subject to revision or amendment, the time to take an appeal is tolled. Respondent, not being able to point to any logical distinction between the *Zimmern* case and present one, says (answering brief, opposing grant of writ of certiorari, p. 4) that "Judge Cardozo . . . was not dealing with a motion for rehearing filed after ten days from a decree".

But respondent concedes that the motion was one under Rule 52 (b), and *not* a motion for rehearing or a new trial, and the Circuit Court of Appeals so ruled.

In an attempt to reconcile these inconsistencies, respondent insists that the motion was simply wrongly labelled, and that the relief requested therein was only properly

grantable under Rule 59. But this question is not properly before this Honorable Court, for the Court of Appeals rightly treated the motion as correctly presented under Rule 52 (b). And petitioner does not contest that ruling.

Respondent further seems to urge that the motion was not made in time. This again is a matter not properly before this Honorable Court, for the Circuit Court of Appeals says: "The motion in this case, though not made within the time prescribed in rule 52(b), was made within that time as enlarged by an order obtained by appellant pursuant to rule 6 (b) of the Federal Rules of Civil Procedure" [R. Vol. IV, p. 687].

The petition herein does not request any review of this point, nor can there be any argument whatever that the motion was timely, for Rule 6 (b) says "When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, . . . order the period enlarged. . . ."

Petitioner proceeded in a timely manner to procure additional findings and to have the terms of the judgment amended; and under all previous practice and the *Zimmern* case, such activity clearly stays the period for appeal. Petitioner's arguments in this regard are fully set forth in petitioner's brief in support of his petition.

It is respectfully urged that the decision of the Court of Appeals be reversed.

Respectfully submitted,

JOHN FLAM,

Counsel for Petitioner.